United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

76-4144

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76-4144

To be argued by

JOSEPH M. TAPPER

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DOCKET NO. 76-4144

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LILIAN ILUSTRISIMO,
Petitioner

- against -

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent

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Petition to Review an Order of the
Board of Immigration Appeals

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PETITIONER'S BRIEF

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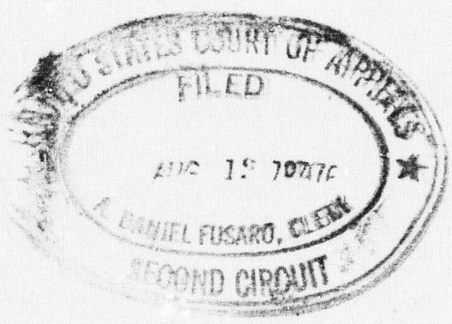

JOSEPH M. TAPPER
RITTER, TAPPER & TOTTEN
266 PEARL STREET
HARTFORD, CONNECTICUT
ATTORNEY FOR THE PETITIONER

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STATEMENT OF ISSUES

DID THE IMMIGRATION JUDGE ERR BY NOT PLACING THE PROPER WEIGHT OF THE TESTIMONY OF THE PETITIONER DURING THE HEARING ON HER APPLICATION FOR RELIEF PURSUANT TO SEC. 243(h) OF THE IMMIGRATION AND NATIONALITY ACT (8 U.S.C. 1253(h))? AND;

DID THE IMMIGRATION JUDGE FURTHER ERR BY ASSESSING ALL OF THE EVIDENCE BEFORE HIM IMPROPERLY AND BY DENYING THE PETITIONER'S APPLICATION FOR RELIEF PURSUANT TO SEC. 243(h) OF THE IMMIGRATION AND NATIONALITY ACT (8 U.S.C. 1253(h))? AND;

DID THE BOARD OF IMMIGRATION APPEALS ERR BY AFFIRMING THE DECISION OF THE IMMIGRATION JUDGE?

RELEVANT STATUTE

Sec. 243(h) of the Immigration and Nationality Act (8 U.S.C. 1253(h))

"The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion, or political opinion and for such period of time as he deems to be necessary for such reason."

JURISDICTIONAL GROUNDS

Review is sought pursuant to Sec. 8 U.S.C. 1105(a) and 5 U.S.C. 701 et seq.

TABLE OF CASES CITED

STATEMENT OF THE CASE

The Petitioner is seeking review of an order denying her Application for Temporary Withholding or Deportation pursuant to Sec. 243(h)[1] of the Immigration and Naturalization Act (8 U.S.C. 1253(h)) which decision was upheld by the Board of Immigration Appeals[2] based on the facts presented to the Immigration Judge.

The Petitioner entered the United States at San Francisco on or about March 9, 1970 as a Visitor for Pleasure and was authorized to remain in that status until September 8, 1970. She was thereafter granted a period of Voluntary Departure until October 8, 1970. On May 6, 1974, she was ordered to appear at an Order to Show Cause in Deportation to be held at the Office of Immigration and Naturalization Service at Hartford, Connecticut on May 21, 1974. Said hearing was adjourned on two occasions until March 24, 1975 at which time the Petitioner presented evidence in support of her Application for Relief pursuant to Sec. 243(h) of the Immigration and Nationality Act which Application had been timely filed.

On March 24, 1975, the Immigration Judge decided the case, and found that the Petitioner was deportable as charged. He subsequently granted her a period of Voluntary Departure and denied her Application for Temporary Withholding of Deportation pursuant to Sec. 243(h) of the Immigration and Nationality Act. An Appeal to the Board of Immigration Appeals from said decision was timely filed. On March 5, 1976, the Board of Immigration Appeals affirmed the Immigration Judge's decision and dismissed the Appeal. The matter was timely brought to this court for review.

1. Joint Appendix p. A-15
2. Joint Appendix p. A-16

ARGUMENT

The Petitioner maintains that the applicable rules of law were not applied in reaching the aforementioned decision, and that the actions of the Immigration and Naturalization Service have been arbitrary. On the basis of the evidence heard by the Immigration Judge and on the basis of the law presented to the Board of Immigration Appeals, the Petitioner claims that a cause of action for review exists. The Petitioner concedes that the basis for review is very limited as stated in the case of Joseph Paul et al vs. Immigration and Naturalization Service 521 F. 2d 194 (1975). In that matter, the court stated at Page 197:

> "A judicial review of discretionary administrative action is limited to the questions of whether the applicant has been accorded procedural due process and whether the decision has been reached in accordance with the applicable rules of law. Furthermore, the inquiry goes to the question whether or not there has been an exercise of administrative discretion and, if so, whether or not the manner of exercise has been arbitrary or capricious."

The Petitioner testified that she was a member of certain politically active groups whose activities are characterized as "anti-Government".[1] She testified that while a member of these groups, she distributed leaflets, gave speeches and held the office of Second Secretary of that organization.[2] She further testified that as a result of her political activities, she feared for

1. Joint Appendix pp. A-2 - A-4

2. Joint Appendix p. A-4

her life or safety and went into hiding because of her fear of the Government Police.[1] She also testified that she believed that her name was already in the files of the National Bureau of Investigation that channels cases of political dissidents.[2] Morever, she testified that a secretary of her organization was persecuted while she was in the Philippines.[3]

After listening to all of the testimony, the Immigration Judge completely discounted her testimony and refused to lend credence to her fears. Instead, much was made of the letter from the Office of Refugee and Migration Affairs, Department of State which letter concluded that the "...Philippine Government...would have no political interest in her and that her fear of persecution in the Philippines is not well founded...".[4]

At least one court of law has found letters of such a nature to be somewhat suspect. In a similar type of matter, the court in Kasravi vs. Immigration and Naturalization Service 400 F. 2d 675, 676, 677, the court stated that "the only evidence offered in opposition to Kasravi's petition is rather a perfunctory letter written by a State Department Official concluding generally that an Iranian student would not in all likelihood be persecuted for activities in the United States. Not only does this letter lack persuasiveness, but the competency of State Department letters in matters of this kind is highly questionable". In a footnote to this paragraph, the court states that "such letters from the State Department do not carry the guaranties of reliability

1. Joint Appendix p. A-14
2. Joint Appendix p. A-5
3. Joint Appendix p. A-6
4. Joint Appendix p. A-13

which the law demands of admissible evidence. A frank but official discussion of the political shortcomings of a friendly nation is not always compatible with the high duty to maintain advantageous diplomatic relations with nations throughout the world. The traditional foundation required of expert testimony is lacking; nor can official position be said to supply an acceptable substitute. No Hearing Officer or Court has the means to know the diplomatic necessities of the moment in the light of which the statements must be weighed".

It should also be noted that the letter from the State Department fails to take into account the public anti-Government statements made by the Petitioner. It would seem said activities would have a significant impact upon the potential persecution of the Petitioner upon her return to the Philippines. The Petitioner contends that the summary dismissal of her testimony by the Immigration Judge was improper and arbitrary.

It has been alleged that her liberty and/or life would be in danger by her deportation to the Philippines. History is replete with instances of punishment of political dissidents in the Philippines during the Marcos regime. The Petitioner's own testimony evidenced a well-founded fear of persecution. In support of same, she submitted documentary evidence of specific instances of the type of persecution which she feared and buttressed this evidence with her own testimony. Specifically, she testified:

"...Q. Have you ever made any statements or attended any rallies with the students?

A. Yes, I attended rallies and spoke many times.

Q. Were you ever in prison or jailed because of this?

A. No, I was not because they became strict. I get into hiding and this is why I wasn't able to be put into prison".[1]

The Decision of the Immigration Judge concludes that the Petitioner "...submitted no satisfactory evidence which would warrant a reasonable fear of her persecution in the Philippines if she returns there".[2] Such a conclusion evidences a flat disregard of the Petitioner's testimony. Merely because the evidence is presented by an interested party does not render it unworthy of belief, indeed, the law has long since eliminated the disqualification of witnesses on the basis of interest. (Texas vs. Chiles 88 U.S. 488; Dellefield v. Blockdel Realty Co. C.A. N.Y. (1942) 128 F. 2d 85; U.S. v. Insang C.A. N.Y.(1970) 423 F. 2d 1165, cert. denied 400 U.S. 841).

It is significant that the Immigration Judge did not dispute any of the Petitioner's factual claims. In the absence of any evidence to the contrary other than the letter from the State Department mentioned above, the Petitioner's conclusions were entitled to greater weight than that afforded her by the Immigration Judge. Her testimony was not merely in support of a civil or other legal claim, but was to the effect that she would be incarcerated or put to death as a result of her activities. Surely testimony of this nature should be accorded more consideration than that which was given to her by the Immigration Judge. The United States has always been a haven for refugees, and a sanctuary for those individuals who have not been able to speak their mind in their own country for fear of reprisals from a strong armed dictator.

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1. Joint Appendix p. A-4

2. Joint Appendix pp. A-12 - A-13

It should be noted that the mere fact of her testimony enhanced the risk of persecution were she forced to return to the Philippines. One is faced with the dilemma as to why an individual would fabricate such a tale, when the results of said fabrication would be disastrous. Deportation Hearings are conducted in a public forum. Testimony given at these Hearings are readily available to various interested parties. The only seemingly logical answer to the question as to why one would voluntarily give testimony, which testimony in and of itself would have devastating consequences, would be that the witness was truly frightened and believed with good cause that she would be subject to persecution if forced to return to the Philippines.

CONCLUSION

The Petition for Review should be sustained.

August 11, 1976

Respectfully submitted,

JOSEPH M. TAPPER
RITTER, TAPPER & TOTTEN
Attorney for the Petitioner

COPY RECEIVED
Robert B. Fiske, Jr.
UNITED STATES ATTORNEY
8/12/76
Marian F. Bryant